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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ELEANOR M. BLUE, Plaintiff and Appellant, v. ANTONIO CONSTANZA, Defendant and Respondent.	A154342 (Contra Costa County Super. Ct. No. MSC12-02493)

Eleanor M. Blue made an offer to purchase real property owned by Laura Isadore. Blue and Isadore signed a purchase agreement, but a disagreement arose about the purchase price and escrow did not close. Isadore sold the property to Antonio Constanza. Blue filed a lawsuit against Isadore and Constanza seeking specific performance of the purchase agreement. Blue settled with Isadore, and trial proceeded against Constanza.

After a bench trial, the court determined Blue was not entitled to specific performance and entered judgment for Constanza. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Blue—an attorney and real estate broker—has owned and managed rental properties for decades. Isadore owned real property in Richmond. In September 2012, Blue offered to purchase the property for $205,000. Realtor Mark Smith represented Blue and Isadore in the transaction. Both parties signed the "Residential Purchase Agreement and Joint Escrow Instructions" (purchase agreement or agreement).

[1] We recite only those facts relevant to the dispositive issue on appeal.

Paragraph 11 of the agreement is entitled "SELLER DISCLOSURES; ADDENDA; ADVISORIES; OTHER TERMS." Under paragraph 11D, Smith handwrote: "Seller will pay for repair costs based on Pest Inspection Report[.]" The agreement did not attach the pest inspection report.

Escrow was scheduled to close on October 10, 2012. During escrow, Smith learned Blue and Isadore disagreed about paragraph 11D. Isadore and Smith interpreted that paragraph to mean Isadore would pay $2,700 for repairs identified in a Terminix report Isadore obtained. Blue, however, interpreted paragraph 11D to mean she would pay for a pest inspection, but that Isadore "would pay for the repairs reflected in that report."

On October 2, 2012, Blue obtained a pest inspection report from Fisk Termite Control, which described extensive termite damage and estimated a cost of repair of approximately $35,000. Blue requested a credit of $35,000 from the purchase price. Isadore rejected the request. Blue refused to purchase the property for $205,000. The parties did not reach an agreement on the price of the property and escrow did not close. Isadore sold the property to Constanza, who spent substantial time and money renovating it.

Blue filed a lawsuit against Isadore and Constanza, seeking specific performance of the purchase agreement. Blue and Isadore settled, and trial proceeded against Constanza. After a four-day bench trial, the court determined Blue was not entitled to specific performance "because there was no valid and enforceable contract for the purchase of the property between Blue and Isadore. Moreover, even if the purported purchase [agreement] was valid and enforceable, it would simply not be just and reasonable to Constanza to award the equitable relief requested."

The court found paragraph 11D was ambiguous because it "did not reference which 'Pest Inspection Report' would be used as the basis for the repairs to be paid for by Isadore. Isadore and the dual realtor for Isadore and Blue, Mark Smith, both thought that the term referred to a [Terminix] Report that had been obtained by Isadore. Although no copies of that report were submitted into evidence, the evidence was undisputed that the

repairs called for in that report were eventually completed at a cost of $2,700. Blue took the term to mean that Isadore would pay for any repairs called for in any termite report that Blue obtained, apparently regardless of cost. She obtained an inspection and report from Fisk Termite that described much more extensive and expensive repairs with an estimated cost of $35,000. Since Isadore and Blue each insisted that their own interpretation of the contract clause was the correct one, the transaction stalled and Blue's purchase of the property never occurred."

Next, the court determined the meaning of paragraph 11D was material because it reduced the purchase price by more than 15 percent, whereas the "repairs envisioned by Isadore and the . . . real estate broker . . . totaled a little more than 1% of the purchase price. These figures are so far apart that it is clear that there was no meeting of the minds regarding the ultimate purchase price, rendering this purchase contract unenforceable." In addition, the court determined Blue's construction of paragraph 11D "as giving her a blank check reduction on the purchase price based upon the sole discretion of her retained pest inspector" was "not reasonable." The court found Blue, an attorney and real estate broker, was aware of the "unusual nature" of paragraph 11D "and attempted to make use of its ambiguity to force a substantially lower purchase price than was ever contemplated by Isadore or Smith."

Finally, the court opined equitable relief was unavailable because Constanza "purchased the property innocently and without any hint of wrongful intent as to Blue's interests" and that he had "performed a substantial amount of work on the property and ha[d] turned it into a fine home for his family." It concluded the balance of the equities "unquestionably" favored Constanza and "[i]t would be manifestly unjust and unreasonable to grant the relief requested." The court entered judgment for Constanza.

DISCUSSION

Blue claims the court erred by declining to specifically enforce the purchase agreement.[2] As relevant here, a plaintiff seeking specific performance must prove the existence of an enforceable contract. (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472; *Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 409.) Price is a material point in a written contract for the sale of real property. (*Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 766; *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 349.) " 'Mutual assent or consent is necessary to the formation of a contract' and '[m]utual assent is a question of fact.' " (*Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.* (2015) 240 Cal.App.4th 763, 772.)

" ' " '[W]here the existence . . . of a contract or the terms thereof is the point in issue, and the evidence is conflicting or admits of more than one inference, it is for the . . . trier of the facts to determine whether the contract did in fact exist . . . [.]' " ' " (*Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.*, *supra*, 240 Cal.App.4th at pp. 771–772.) Here, the parties presented conflicting evidence on whether an enforceable contract existed, that is, whether there was a meeting of the minds on the price Blue would pay for the property. "As a result, the existence of the contract is a question of fact, and we must uphold the trial court's finding if supported by substantial evidence. [Citations.] Substantial evidence is evidence of ' " 'ponderable legal significance,' " ' ' " 'reasonable in nature, credible, and of solid value . . . .' " ' [Citation.] 'The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record.' " (*Id.* at p. 772.)

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[2] Blue also argues Constanza lacks "standing to challenge the validity" of the purchase agreement. This argument is unavailing. As the plaintiff, Blue had the burden to establish standing to maintain a claim for specific performance. (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 495.) Constanza's asserted lack of standing is of no consequence.

The court found "Blue and Isadore never agreed on the purchase price because of their different interpretations of" paragraph 11D. Substantial evidence supports this finding. Realtor Mark Smith interpreted paragraph 11D to require Isadore to pay $2,700 for repairs identified in the Terminix report. Isadore shared this interpretation. Blue, however, interpreted paragraph 11D to mean Isadore would pay $35,000 for repairs reflected in the Fisk Termite report. The parties did not reach an agreement on the price of the property, and Blue confirmed she refused to purchase the property for $205,000. The evidence demonstrates the parties had no meeting of the minds regarding a material term—the ultimate purchase price. In California, "there is no contract until there has been a meeting of the minds on *all* material points." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357–358.) Blue's alternate view of the evidence does not demonstrate a lack of substantial evidence supporting the court's finding. (See *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 425.)

Relying on *Schomaker v. Osborne* (1967) 250 Cal.App.2d 887, Blue claims uncertainty about the cost of repairs and the responsible party did not prevent the formation of a contract. *Schomaker* does not assist Blue. That case concerned an option agreement; the appellate court held the necessity of future agreement on limited phases of the agreement did not prevent the creation of a contract upon the acceptance of the option offer. (*Id.* at pp. 892–893.) Similarly unavailing is Blue's reliance on *Pivardiere v. Mercurio* (1955) 137 Cal.App.2d 808. In that case, the uncertainty of the contract " 'as to the price to be paid or which of the parties was to pay' " was not raised in the trial court and the appellate court declined to consider the issue for the first time on appeal. (*Id.* at p. 811.)

The absence of a contract is fatal to Blue's specific performance claim. "It is . . . basic hornbook law that the existence of a contract is a necessary element to an action based on contract, regardless whether the plaintiff seeks specific performance or damages for breach of contract." (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557.)

We have considered Blue's remaining arguments regarding the validity and enforceability of the purchase agreement; they merit no further discussion. (*Lyons v. Santa Barbara County Sheriff's Office* (2014) 231 Cal.App.4th 1499, 1506.)[3]

DISPOSITION

The judgment is affirmed. Constanza is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

[3] Having reached this result, we need not address the parties' remaining arguments regarding Blue's entitlement to specific performance, except to observe the "equitable remedy of specific performance cannot be granted if the terms of a contract are not certain enough for the court to know what to enforce." (*Patel v. Liebermensch*, *supra*, 45 Cal.4th at p. 349; *Mills v. Skaggs* (1944) 64 Cal.App.2d 656, 658–659.) Here, the court was within its discretion to deny specific performance based on the uncertainty of the price, a material contract term. (*Anderson v. Perminter* (1947) 78 Cal.App.2d 378, 383.)

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Jones, P.J.

WE CONCUR:

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Simons, J.

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Burns, J.

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